JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 121/90

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS

EVERTON MORRISON

Jack Hines for applicant

Miss Marcia Hughes for Crown

13th & 20th January, 1992

CAREY, J.A.

On 25th July, 1990 in the Home Circuit Court before Langrin, J., and a jury, this applicant was convicted of the murder of Angella Dujon the former wife of the West Indian wicket-keeper Jeffrey Dujon. The allegation was that she was shot to death by one of two gunmen one of whom was this applicant on Boxing Day, 1988.

The Crown's case which rested largely on circumstantial evidence and perhaps on admissions by this applicant, can be outlined as follows. The victim's semi-nude body was recovered a short distance from her car which was found over a precipice on the Irish Town main road at a place called Duncan's Corner in St. Andrew. She had been shot and from the state of her dress, perhaps sexually assaulted. A police officer found the casing of a 9 mm. cartridge some three chains along the road from the place where the car had gone off the road. The car itself had bullet holes. Another 9 mm. cartridge case was found by the car. The Government Ballistics Expert, Assistant Commissioner Daniel Wray, recovered two 9 mm. spent bullets from the channel of the inside panel on the driver's side. Tests carried out by him showed

that the cartridge cases, and bullets to which we have referred were fired from a pistol, a colt semi-automatic pistol traced to this applicant. This weapon, when tested, showed that it had been recently discharged i.e. round about the material date. In an interview with the police, the applicant when asked where was the gun used in the shooting admitted possession and directed the police to contact his girlfriend, Julie Plummer. She gave evidence for the Crown. The police did retrieve this firearm from her.

She gave damning evidence against the applicant. On 26th December, 1988, at about 8:00 p.m. she saw the applicant remove a black plastic bag from underneath the bed and go out with another young man named "Jacko" whose correct name is Lloyd Brown. We pause to observe that Lloyd Brown was charged jointly with the applicant for the murder of Mrs. Dujon but was dismissed at the preliminary examination. But, to continue her narrative, they both returned at about 1:00 a.m., the applicant clad only in his briefs. He told her that if anyone enquired whether he had slept there that night, she should say that he had. Thereafter she heard the sound of clothes being washed. When she got awake that morning, both men had left the premises. She noticed the applicant's trousers in a bucket of water. It was the same pair he wore the night before, and on it, she saw bloodstains. On the 30th December, the applicant told her that police and soldiers were on the road and that she should inform Lloyd Brown that he should give her One Thousand dollars ($1,000) and that the guns were in the plastic bag on the hill. That very day the police detained the applicant and Lloyd Brown. On January 7, 1989 the police returned to her at the house and recovered the plastic bag with guns.

The police evidence disclosed that Julie Plummer pointed to some place behind the house and there a plastic bag containing two firearms, one of which was the murder weapon, was found. When these firearms were recovered, the applicant acknowledged they were his.

Another witness, one Adolphus Williams, a neighbour of Julie Plummer and the applicant, related that on 26th December, 1988 at about 11:50 p.m. he saw the applicant and another man enter his premises. In a conversation which ensued between the applicant and himself, the applicant remarked that he would not tell anyone that he saw Williams and that if he heard anything in the morning, he was to say nothing — ending on the sinister note — "for is trouble." Williams gave the retort courteous — "I don't business with anybody." The applicant was holding a rag which covered some object which the witness never identified.

The applicant made an unsworn statement in which he explained that he was at home on Boxing Day and knows nothing about the murder.

Mr. Hines made submissions in respect of two of the three grounds filed. Ground 1 stated as follows:

> "1. The learned Trial Judge misdirected and or inadequately directed the Jury on a critical and disputed factor of proof by way of circumstantial evidence, being the alleged presence of the prosecution witness Julie Plummer when the Police purportedly attended at her home on the 7th January, 1989, in that he omitted to direct the Jury on a crucial piece of evidence on page 20 of the record herein when the witness Plummer stated quite unequivocally."
>
> "It was not in January he (referring to the Police Officer Dawes and other policemen) come there' (referring to her home) and further in support and immediately following upon that statement, that it <u>could not</u> be true that she was at her house on the 7th January, 1989 when the police came.'"

Counsel had some difficulty in expanding on this ground and in the event, did not press it. There was never any live issue in the case as to when the police attended at the applicant's home and recovered the guns. The witness Julie Plummer was altogether unsure of the precise date, but was certain, it was a Saturday on which this event occurred. She said at page 29 - "I don't remember the date, but it was on a Saturday." One of the circumstantial factors was the recovery by the police of the murder weapon at the applicant's home. The question of fact for the jury was whether or no, the plastic bag with guns including the murder weapon was found there. The date of its occurrence was of little or no significance. We need say no more on this matter because counsel sensibly desisted.

The second ground was as follows:

> "2. The learned Trial Judge went beyond the limit of fair comment when he stated in his address to the Jury, (see page 135) 'but the question of mistaken identification in my view does not arise' in that identification was in issue as a factor **in the unbroken chain** of proof by way of circumstantial evidence and this comment to the Jury tended to seal this particular factor and to sway them unfairly either individually or collectively towards the inescapable conclusion of the guilt of the Applicant."

As we listened to counsel's arguments, we were reminded of the words of Alexander Pope —"willing to wound, and yet afraid to strike: (Epistle to Dr. Arbuthnot). We noted these words from the ground of appeal — "and this comment to the Jury tended to seal this particular factor." Nonetheless we were assured by counsel that he was not complaining that the learned trial judge had usurped the jury's function. He conceded this was plain from the context. This is what the trial judge had said: (at p. 135)

> " Had the witness ever seen the defendant before and if so how long? Now, these are all matters for you, Mr. Foreman and members of the jury.

> "The evidence is before you, and it is a matter for you, but the question of a mistaken identification in my view does not arise."

We entirely agree with counsel that the issue was not withdrawn from the jury. A judge is entitled to express his views on the facts and he may do so strongly but he must not, in doing so, withdraw any matter from the jury's consideration. In **R. v. Robinson** (unreported) S.C.C.A. 146/89 dated 29th April, 1991, we said this:

> " It is trite that a trial judge, as part of his duties to ensure a fair trial and to assist the jury on the facts of the case, is perfectly entitled to comment on the facts. Counsel for the Crown, as well as counsel for the defence, are equally entitled to do so. But the judge is neither counsel for the prosecution nor for the defence: he represents neither side: he represents the interests of justice. His comments must therefore always be fair and just: they must be warranted on the facts and issues which fall to be determined. His comments may be strong but he must not fail to warn the jury that they are entitled to reject his comments in favour of their own judgment if they consider his views erroneous or fanciful or misconceived or for any good reason unacceptable to them because they are the judges of the facts. The verdict that is sought is theirs. Where therefore the comment tends to ridicule the defence, or to suggest that there is some burden on the accused to prove his innocence, or erodes the defence, or is unwarranted on the facts, the judge would have over-stepped the lines of proper judicial comment. He would be failing most seriously to ensure the fair trial that the Constitution guarantees and would lead to a substantial miscarriage of justice. This list is not intended to be exhaustive."

Mr. Hines did not show in any shape or form in what respect the comment could be judged unfair or prejudicial. It was clear that the issue of identification was not a live issue.

We stated before and we repeat, that the Crown's case depended on circumstantial evidence which we have previously detailed. The evidence of identification by the witness Adolphus Williams of the applicant on the night of 26th December, was not that he saw a man whom he identified as the applicant. The evidence was that they had engaged in a conversation at arms length from each other, in circumstances where lighting was adequate. Moreover, the applicant was known to him for some five to six years. We note that the trial judge gave full directions on identification evidence, which we suppose he proffered ex abundante cautela. There really was no substance in this ground.

Finally, despite the absence of any ground complaining that the verdict was unreasonable or could not be supported on the evidence, we have carefully considered the facts adduced in proof of the applicant's guilt. We are satisfied that the judge left all the issues fairly to the jury and they came to a verdict which is warranted on the facts.

For these reasons, this application for leave to appeal is refused.